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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In Re CLEVELAND TANKERS, INC., as owner and operator of the M/V JUPITER, for exoneration from or limitation of liability.

AMERICAN STEAMSHIP COMPANY,

Petitioner,

v.

CLEVELAND TANKERS, INCORPORATED; TOTAL PETROLEUM, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANIES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT FIREMAN'S FUND INSURANCE COMPANIES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Fireman's Fund Insurance Companies adopts the Statement of Questions Presented for Review as set forth in the brief of Respondent Total Petroleum, Inc.

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INTRODUCTION

Certiorari, which is not a matter of right, but of judicial discretion, is not warranted because there are no "compelling" reasons presented by this case. Supreme Court Rule 10. Contrary to Petitioner's contentions, the Sixth Circuit's decision conforms to this Court's admiralty policies enunciated in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708 (1975) ("*Reliable Transfer*"); there is no conflict among the circuits with respect to the application of apportionment of fault under *Reliable Transfer*; and the exclusion of Coast Guard reports was appropriate.

This is a case in which the negligence of Petitioner triggered a series of events which led to the ultimate destruction of a vessel, its cargo, and the loss of life. After a lengthy trial and consideration of all of the evidence, both Petitioner and Respondents were found to have contributed to the damage. All were held accountable to the extent determined by the trial court, in its discretion, and affirmed by the Court of Appeals. Petitioner was apportioned 50% of the fault and Respondents Total Petroleum, Inc. and Cleveland Tankers, Inc. each were apportioned 25% of the fault.

The instant Petition is nothing more than a last attempt to revisit and challenge the factual findings of the district court. However, this is not the proper forum for Petitioner to air its dissatisfaction with the court's findings, including those findings that Petitioner was a proximate cause of the incident. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Accordingly, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondent Fireman's Fund Insurance Companies adopts the Counterstatement of the Case as set forth in the brief of Respondent Total Petroleum, Inc.

In addition and to reiterate certain points pertaining to Respondent Fireman's Fund Insurance Companies' involvement in this matter, Respondent states that Cleveland Tankers, Inc. and Total Petroleum, Inc., entered into a Charter Party whereby Total Petroleum, Inc. chartered the M/V JUPITER to carry a cargo of gasoline from Sarnia to Bay City, Michigan. On September 16, 1990, the M/V JUPITER was moored at Total Petroleum, Inc.'s oil transfer facility on the Saginaw River in Bay City, Michigan, discharging the cargo of gasoline.

At approximately 8:30 a.m. that morning, the M/V BUFFALO, owned by Petitioner, was headed upstream on the Saginaw River with a load of coal. The M/V BUFFALO passed the JUPITER at an excessive rate of speed causing the JUPITER to surge out of the berth at the Total facility, breaking the vessel's cargo hose through which the unleaded gasoline was being discharged. The gasoline ignited and fire quickly enveloped portions of the deck of the JUPITER, followed by a series of explosions. The crew abandoned ship and the vessel sank.

As a result of the fire, 877,944 gallons of the gasoline carried aboard the M/V JUPITER were destroyed. The total value of the gasoline was $845,961.42. Under its Open Cargo Policy No. 62685 (the "Policy"), Respondent Fireman's Fund Insurance Companies provided insurance covering the gasoline carried on the M/V JUPITER. By virtue of Fireman's Fund's payment to Total Petroleum, Inc. pursuant to the Policy, Fireman's Fund was subrogated to Total Petroleum, Inc.'s claim for loss of the gasoline cargo.

REASONS FOR DENYING THE PETITION

Respondent Fireman's Fund Insurance Companies adopts in full the arguments advanced by Respondent Total Petroleum, Inc. in support of denial of the Petition for Certiorari, as set forth in the brief of Respondent Total Petroleum, Inc.

In addition, Respondent Fireman's Fund Insurance Companies submits the following.

CERTIORARI IS NOT WARRANTED ON THE ISSUE OF WHETHER THE APPORTIONMENT OF FAULT MUST ENCOMPASS CONSIDERATIONS OF BOTH CULPABILITY AND "CAUSATIVE POTENCY"

A. Petitioner's Purpose In Seeking Review In This Court Is To Once Again Attack The Factual Findings Of The District Court.

Although Petitioner recognizes that this Court "does not sit as an error correcting court," (Petition, p. 25), in essence, that is exactly what Petitioner has asked this Court to do. It is well established that the judgment of the trial court will not be set aside unless it is clearly erroneous. *See Harbor Tug & Barge, Inc. v. Belcher Towing Co.*, 733 F.2d 823 (11th Cir. 1984). The "clearly erroneous" limitation on review extends to all findings of fact, "including the apportionment of damages." *Id.* at 825. *See also Marine Transport Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138, 1142 (5th Cir. 1994) (a trial court's findings of relative fault is reviewed under the clearly erroneous standard); *Inland Oil & Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 326 (5th Cir. 1983) (a district court's apportionment of fault, following *United States v. Reliable Transfer*, may not be disturbed unless clearly erroneous).

Petitioner's real purpose in attempting to challenge the factual findings of its negligence are all the more transparent in light of this strict standard of review. Realizing that the district court's finding that Petitioner was a proximate cause of the incident is well supported by the evidence, Petitioner attempts to have that finding altered on the basis of some illusory legal principle which has never before raised any serious question or concern for the courts. Accordingly, this Court should reject Petitioner's attempt to backhandedly attack the district court's factual findings in the guise of an argument that there is some split of legal authority which warrants this Court's review.

B. There Is No Conflict Among The Circuits Regarding The Role, If Any, Which Causation Plays In The Apportionment Of Fault After *Reliable Transfer* So As To Warrant Review By This Court.

Petitioner submits[1] that certiorari should be granted to clarify the issue of whether causation or "causative potency" must be considered by a maritime court in apportioning damages under the comparative fault doctrine in the wake of *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708 (1975). Notwithstanding Petitioner's claim that the decision below by the Court of Appeals for the Sixth Circuit adds to an inconsistency among trial and appellate courts over the application of comparative

[1] A response to Petitioner's argument is submitted assuming *arguendo*, that its "causative potency" argument is ripe for review. As submitted by Respondent Total Petroleum, Inc. and adopted by this Respondent, because Petitioner never argued to the district court that apportionment of fault should be based on "causative potency," that issue is not appropriately before this Court.

fault principles, Petitioner has failed to actually identify any relevant conflict in the state of the law. Therefore, Petitioner's request for certiorari should be denied.

The post-*Reliable Transfer* cases cited by Petitioner[2] do not address the issue raised by Petitioner, much less support Petitioner's assertion that a conflict exists among the circuits with respect to whether "causative potency" must be considered by an admiralty court in apportioning damages under the doctrine of comparative fault. The cited cases address only the issue of whether superseding cause, as a defense to liability, remains viable after this Court's adoption of comparative fault in *Reliable Transfer*. However, that issue is of no relevance nor import to the instant proceedings because Petitioner did not raise superseding cause as a defense in the court below. To be sure, Petitioner specifically has disclaimed any reliance on that doctrine. (Petition at 14; Petition App. A at 14a).

Petitioner's contention that "causative potency" is a factor to be considered in apportioning damages under comparative fault principles is without legal support. *Reliable Transfer* does not require the consideration of causative

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[2] Petitioner asks this Court to compare *Lone Star Industries, Inc. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1991) and *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646 (5th Cir. 1992) with *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), and points out that the courts in *Lone Star* and *Mays* held that the doctrine of superseding cause survived the adoption of apportionment of fault, while the court in *Hercules* rendered the doctrines of intervening cause and last clear chance unnecessary once any contributory cause is established. This argument misses the mark. First, *Lone Star* and *Mays* dealt with the issue of superseding cause in the context of establishing liability, not apportionment of fault. Second, *Hercules* contains unique factual circumstances and is actually silent with respect to superseding cause.

potency in apportioning damages. *Reliable Transfer* has consistently been interpreted to require apportionment of damages in comparative fault cases on the basis of culpability or blameworthiness, without consideration of causation. *See, e.g., Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646 (5th Cir. 1992) (liability is to be allocated among the parties proportionately to the comparative degree of their fault); *Harbor Tug & Barge, Inc. v. Belcher Towing Co.*, 733 F.2d 823 (11th Cir. 1984) (liability "is to be allocated among the parties proportionately to the degree of their fault," not according to their degree of causation); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 402 F. Supp. 1187 (W.D. Wa. 1975), *vacated on other grounds*, 565 F.2d 1129 (9th Cir. 1977) ("culpability, not causation, is the standard by which damages are assessed in comparative negligence cases). As the court in *Kalland v. North American Van Lines*, 716 F.2d 570 (9th Cir. 1983) stated:

> . . . if injuries cannot be separately apportioned, then the comparative negligence ratio controls, unaltered by some independent assessment of degree of causation. The whole point of comparative negligence is that the relation between injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

Id. at 573.

In *Whitney Steamship Co. v. United States*, 747 F.2d 493 (2d Cir. 1984), the cross-appellant asserted that the Magistrate below had erroneously apportioned damages on the basis of the degree of causation rather than the degree of fault. *Id.* at 75. The Second Circuit, implicitly recognizing the standard for apportionment of damages to be degree of fault and not causation, disagreed, stating

that the Magistrate "properly carried out his responsibilities of allocating damages in proportion to the fault of each party under *Reliable Transfer*." *Id.*

Petitioner advances no legal support for its position that causative potency, in the form of superseding cause or otherwise, must be accounted for in the apportionment of damages. Superseding cause, by its terms, is a principle which serves to exonerate a party from liability. It is difficult to comprehend how a court would apply the principle of superseding cause in apportioning fault. If a court finds a superseding cause to exist, that superseding cause serves to exonerate a party from liability, thereby eliminating the need to ever reach the issue of apportionment of fault.

To that end, there also is no reason nor need for this Court to grant certiorari simply because such relief was granted in *Exxon v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). The issue under consideration in *Exxon*, is whether the district court properly found that one of the parties was a superseding cause of the damages and whether superseding cause continues to exist as a defense after *Reliable Transfer*. This Court's treatment of the issue of superseding cause as raised in the *Exxon* case will be of no consequence to the apportionment of fault issue raised by Petitioner here. If this Court affirms the Ninth Circuit in *Exxon*, it would effectively hold that a superseding cause may exonerate a party from liability, thereby eliminating the need for apportionment of fault [to the exonerated party]. If this Court were to reverse the Ninth Circuit in *Exxon*, it would merely eliminate superseding cause as a defense to liability. However, a reversal would have no effect on the apportionment of fault in the instant action where each of the parties was found to be a proximate cause of the damages sustained.

CONCLUSION

For each of the reasons set forth herein, and as adopted from Respondent Total Petroleum, Inc.'s Opposition Brief, Respondent Firemen's Fund Insurance Companies respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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